

5.0 REGULATORY CONSULTATION AND COMPLIANCE

DOE and UC maintain regulatory compliance with environmental laws and regulations as an integrated element of conducting work at LANL. The processes used have continued to ensure compliance and improve the relationships with the regulatory and consulting agencies. Because emergency actions needed to be implemented immediately, DOE and UC initiated emergency permit processes and consultations under appropriate regulations. DOE reiterated the importance of maintaining compliance while emergency actions were being conducted as evidenced in communications to UC (June 22, 2000, memo) and to the USACE (June 22, 2000, letter). DOE, UC, and USACE entered into a memorandum of understanding (MOU) to ensure that all parties maintained environmental compliance during the emergency. Routine compliance processes will continue for non-emergency actions and will be the only compliance processes conducted after actions taken under emergency permits and consultations are completed before or by November 30, 2000.

5.1 U.S. Fish and Wildlife Service

Under Section 7 of the Endangered Species Act, agencies must consult with the USFWS regarding actions that they may undertake that could adversely affect federally-listed T&E species. Regarding emergency actions taken by DOE in response to the Cerro Grande Fire, emergency consultation provisions (50 CFR Part 402.05) were followed. In addition, the Forest Service, Park Service, and USACE were involved in certain compliance activities.

On May 11, 2000, DOE Los Alamos Area Office (LAAO) initiated emergency consultation via telephone with USFWS in Albuquerque, New Mexico. This was followed up with multiple conversations and updates between DOE and the USFWS. On June 1, 2000, DOE/LAAO submitted a letter report documenting actions and requesting a concurrence on effect determinations from the USFWS. The USFWS staff visited LANL and toured affected habitat areas on June 13, 2000. The Service observed the impacts of the fire, fire suppression activities, and limited post-fire activities, e.g., reseedling, mulching, etc. A determination of “may affect but not likely to adversely affect” threatened or endangered species was made concerning the scope of DOE activities known and on-going at that time and concurred upon by the USFWS.

On July 11, 2000, DOE requested a reopening of the Cerro Grande Fire emergency consultation because of new construction activities planned for storm water and silt retention structures at LANL. Representatives of the USFWS field office subsequently revisited LANL and the construction sites. On July 25, 2000, USFWS staff toured the storm water retention structure and sites proposed by DOE for implementation by the USACE. Representatives from DOE, UC, USFWS, and USACE were present during the tour. The DOE submitted additional correspondence to the USFWS on July 28, 2000, requesting USFWS concurrence with a finding that construction activities “may affect; not likely to adversely affect” T&E species and critical habitat. On July 28, 2000, USFWS concurred with DOE’s determination of effect to T&E species and to their critical habitat as a result of new DOE activities.

5.2 New Mexico State Historic Preservation Office

In response to the Cerro Grande Fire, DOE initiated compliance actions consistent with the emergency provisions of Section 106 of the NHPA as codified in 36 CFR Part 800.12. The NHPA typically recognizes emergency provisions for a 30-day period only from the date the event is declared a disaster. Therefore, DOE applied for an extension of emergency provisions as provided under 36 CFR 800.12(d) to address soil erosion and storm water control activities completed on or before November 30, 2000. This November date is the date used by DOE in the June 21, 2000, Notice of Emergency Action as the end date for actions to define emergency undertakings. The NHPA also allows for an expedited 7-day comment period for the SHPO and Tribal Government reviews regarding any DOE-authorized activities that may have an adverse effect on significant historic properties. This comment period has been complied with as appropriate.

The first NHPA compliance action taken was a notification on June 1, 2000, to the Advisory Council on Historic Preservation (ACHP) that the President had declared the Cerro Grande Fire a major disaster. Under this notification, ACHP and SHPO were informed that during the fire and for a period of five months after the fire, corresponding to the annual rainy season, DOE would be engaging in fire suppression and soil erosion and flood control activities. DOE would review these activities and make a good faith effort to avoid impacts to significant historic properties resulting from fire-related undertakings. The review process would follow the stipulations in the Programmatic Agreement among DOE, SHPO, and ACHP on management of historic properties at LANL. At the end of the emergency period, DOE would provide SHPO a written report on the implemented activities.

To date, only one action has resulted in adverse effects to historic properties. This action was the removal of Building TA-2-4, a former reactor fuel rod storage facility for the Omega-West Reactor (TA-2-1). This building was demolished to reduce the risk from radioactive contamination migrating downstream and off-site in the event of a 100-year 6-hour flood event. This undertaking was reported to SHPO on June 23, 2000. During the fire suppression period, three archaeological sites were damaged or destroyed at TA-49. This information will be reported to the SHPO.

5.3 Clean Air Act

On July 6, 2000, a permit application was submitted to the NMED requesting an emergency permit to construct and operate a temporary concrete batch plant in the immediate vicinity of TA-66 in Pajarito Canyon. The request was submitted under the provisions of air quality regulation Title 20, New Mexico Administrative Code, Chapter 2, Part 72, Section 215, Emergency Permit Process. The permit was subsequently issued by NMED on July 10, 2000.

The batch plant was used to supply concrete to construct a large flood retention structure across Pajarito Canyon at TA-66. The temporary plant was owned and operated by Sundt Construction, Inc., who was under contract to the USACE. The plant ran continuously for about 30 days during the construction of the flood retention structure.

The batch plant required an air quality permit under NMED regulations. To ensure compliance with state and federal air regulations, the permit included conditions that limited the emissions, production rate, and duration of the permit. The maximum particulate emissions for the batch plant were estimated at less than three pounds/hour. Dispersion modeling was conducted to assess off-site impacts from particulate emissions from the operation of the batch plant. The results of this modeling analysis showed no exceedances of any ambient air quality standards. The permit was valid for up to 90 days after which the plant was dismantled and removed from LANL. Emissions were estimated to be seven pounds/hour for three days due to an equipment malfunction. NMED approved continued operation of the plant during this period because air quality standards would not be exceeded.

The *Clean Air Act* regulations (40 CFR Part 61) require the filing of a 10-day advance notice for asbestos removal and disposal for routine operations. However, because of the emergency nature of the fire response activities, LANL was exempt from these reporting requirements. Although the reporting requirements for demolition and asbestos removal as specified in the regulations did not apply to the fire response activities, LANL continued to notify the NMED of all such activities that would normally come under the purview of the regulations.

5.4 Clean Water Act

On June 6, 2000, a MOU concerning emergency work control roles and responsibilities for flood control responses to the Cerro Grande Fire was signed by DOE, USACE, and UC. This MOU specifically identified the USACE as being responsible for obtaining any necessary permits or approvals for storm water management facilities under Section 404 (dredge and fill) of the *Clean Water Act*.

On June 21, 2000, DOE issued a Notice of Emergency Action in the Federal Register describing emergency actions that had been or were anticipated to be taken at LANL in response to the Cerro Grande Fire. This notice served as the Public Notice and Statement of Findings regarding DOE's intention to take actions involving construction and other actions within floodplains and wetlands pursuant to DOE's regulations for Compliance with Floodplain/Wetlands Environmental Review Requirements (10 CFR Part 1022). As provided in 10 CFR 1022.18, and because there was an immediate need to take emergency flood control and hazard reduction actions, DOE waived the public review periods that would otherwise apply before DOE took such actions in floodplains and wetlands at LANL.

On July 18, 2000, the USACE determined that the flood retention structure in Pajarito Canyon near TA-18 was a storm water management facility located in non-tidal waters of the United States and was subject to Section 404 permit requirements. Upon further review by USACE, it was ultimately decided that Nationwide Permit No. 43 was applicable to this project and that compliance with this nationwide permit would satisfy the Section 404 requirements of the *Clean Water Act*. In addition to the flood retention structure in Pajarito Canyon, USACE determined that smaller scale activities involving construction of retention/detention ponds, reservoir dredging, and embankment armoring

were subject to the conditions and limitations contained in Nationwide Permit Nos. 3 and 18.

In addition to Section 404 requirements, National Pollutant Discharge Elimination System (NPDES) storm water general permit requirements for construction activities also apply. In particular, flood control and mitigation projects constructed by DOE and USACE at LANL were subject to these requirements. A primary component of the general permit is a requirement to develop a site-specific SWPP Plan. In general, these plans require the use of various techniques or BMPs to control erosion or to limit the amount of sediment or contaminants that can enter waterways from disturbed areas and construction sites. A SWPP Plan was developed for this work in accordance with the U.S. EPA Region 6 General Permit for Construction Activity.

On July 25, 2000, a Notice of Intent for Storm Water Discharges Associated with Construction Activity under a NPDES General Permit was submitted to the EPA. In accordance with applicable regulations, the permit was considered to be in effect on July 27, 2000. Submittal of the Notice of Intent to operate in compliance with the general permit, including adherence to the SWPP Plan, satisfies the NPDES storm water compliance requirements of the *Clean Water Act* for this project.

5.5 Resource Conservation and Recovery Act

Hazardous, mixed, and nonhazardous solid waste produced as a result of DOE or DOE-authorized actions in response to the Cerro Grande Fire were subject to the requirements of RCRA. Hazardous and mixed solid wastes generated as a result of fire suppression or post-fire activities were managed in accordance with the existing RCRA permit for routine operations at LANL. Forty-seven accelerated cleanup actions were initiated during the response to the Cerro Grande Fire. Accelerated cleanup actions were coordinated with NMED. No permit modifications were required for the accelerated cleanup actions or for the treatment, storage, or disposal of these wastes. Nonhazardous solid wastes generated as a result of fire suppression and post-fire activities were also managed in accordance with the existing solid waste management program for routine operations at LANL.